20198 SERVICE DATE - JANUARY 16, 1997
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41517

INDY LIGHTING, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: January 7, 1997

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed by Transcon for Indy Lighting, Inc. (Indy or petitioner). We find that the collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Indy Lighting, Inc., Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 93-02305 DN (referral order dated September 2, 1994). The court stayed the proceeding to enable referral of several issues, including tariff applicability, rate reasonableness, and unreasonable practice, to the ICC for determination.

Pursuant to the court order, petitioner, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve issues referred by the court. By decision served January 9, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 10, 1995, petitioner filed its opening statement, in which it invoked the provisions of section 2(e) of the NRA. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 27, 1995.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

Petitioner asserts that Transcon's efforts to collect the claimed undercharges constitute an unreasonable practice under section 2(e) of the NRA. Petitioner maintains that the written evidence it has submitted shows that Transcon offered a transportation rate upon which Indy relied in tendering shipments to Transcon; that the offered rates were billed and collected by Transcon; and that the payments made by petitioner were accepted by Transcon as payment in full.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or evidence that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[2]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[3]

It is undisputed that Transcon no longer transports property.[4] Accordingly, we may proceed to determine whether the

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[2] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e), by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark 1994); North Penn Transfer, Inc. v. Stationers Distributing Co, 174 B.R. 263 (N.D. Ill. 1994); Allen v. National Enquirer, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

[3] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[4] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were (continued...)

respondent's attempt to collect undercharges is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

In a declaration submitted as part of Indy's evidentiary presentation, Mr. Michael A. Phillips, Indy Plant Manager, states that in early 1987 he personally negotiated transportation arrangements with Mr. Steven Keyes, Transcon Regional Manager, under which Transcon would transport Indy's products at a 40% discount. Attached to his statement are three letters from Transcon representatives advising that a discount of 40% would be applied to Indy shipments handled by Transcon effective 4/8/87 (Exhibit A-1); that the discount was to be increased to 42.8% effective 3/1/89 (Exhibit A-2); and that the discount was to be further increased to 46% effective 1/31/90 (Exhibit A-3). Mr. Phillips states that the discounted charges were noted on the original freight bills issued by Transcon, that the discounted charges were paid by Indy and accepted by Transcon without objection, and that Indy relied upon the rates originally offered by Transcon in tendering its traffic to Transcon.

Petitioner's evidentiary submission also includes the declaration of Mr. Donald R. Carnahan, President and owner of Associated Traffic Services, a freight bill auditing and consulting company. Mr. Carnahan reviewed various documents including a Transcon Statement of Account to Indy,[5] 235 revised freight bills issued by Transcon, and tariff items related to Transcon. Based on his audit of the revised freight bills and

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(...continued)
revoked on September 21, 1990.

[5] The Statement of Account is dated 11/21/92 and is identified as Exhibit "G" attached to Mr. Carnahan's declaration. It is described by Mr. Carnahan as a five-page audit sheet produced by Transcon's collection agency, Lawrence Nathan & Associates. The document lists by freight bill pro number Transcon undercharge claims for 237 individual shipments transported by Transcon between 4/20/87 and 4/7/90. Based on the totals contained in this document, Transcon is seeking to collect $30,804.39 from Indy, consisting of $24,442.23 in undercharge claims and $6,362.16 in interest.

review of the examined documents, Mr. Carnahan concludes that no additional freight charges are due to Transcon from Indy and that Transcon's undercharge claims are invalid.

Attached as Exhibit D1 to petitioner's opening statement are 7 representative sample revised freight bills[6] issued by Transcon. Each of the sample freight bills show the original freight charges billed by Transcon and paid by Indy. We conclude that the representative revised freight bills and the three letters from Transcon representatives confirm the testimony of Mr. Phillips with regard to the existence of a negotiated rate agreement and satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A); (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered by Transcon to Indy; that Indy tendered freight to Transcon in reliance on the negotiated rate; that the rate negotiated was billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Indy for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on January 16, 1997.

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[6] Exhibit D1 includes 10 freight bills described by petitioner as sample revised freight bills. Three of the freight bills--Pro numbers 036-513003, 036-469424, and 036-523448--are not listed among the shipments included in Transcon's 11/21/92 statement of account and cannot be recognized as representative of the undercharge claims that are subject to this proceeding.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 93-02305 DN

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons. Commissioner Simmons did not participate.

Vernon A. Williams
Secretary